**Chicago-Kent Law Review**

Volume 52
Issue 2 *Seventh Circuit Review*

Article 6

October 1975

# Environmental Law

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# ENVIRONMENTAL LAW

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The rapid development of environmental law over the past five years has been sparked by three significant federal enactments: the National Environmental Policy Act of 1969,[1] the Clean Air Act Amendments of 1970[2] and the Federal Water Pollution Control Act Amendments of 1972.[3] The National Environmental Policy Act (NEPA) being the oldest, and in many ways having the broadest impact, has probably generated the most litigation nationally. The governmental reorganization resulting in the creation of the United States Environmental Protection Agency[4] (EPA) and that agency's action in implementing the Clean Air Act amendments has also generated significant litigation, while the implementation of the Federal Water Pollution Control Act Amendments (FWPCA), the most recent enactment, has only started to be subject to judicial action.

Despite the rapid growth of this field of legal specialization, the Seventh Circuit had four cases over the past year that can properly be categorized as environmental cases, three of which will be discussed below.[5] Nonetheless, the rapid expansion of this field, the continuing disputes between the regulators and those regulated as well as the recurrent disputes, mostly arising under NEPA, between various environmental interest groups or privately affected groups of individuals on one side and one or more governmental agencies on the other, make it likely that the court will be

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1. 42 U.S.C. § 4321 *et seq.* (1970).
2. 42 U.S.C. § 1857 *et seq.* (1970).
3. 33 U.S.C. § 1251 *et seq.* (Supp. 1972).
4. Act of July 9, 1970, 84 Stat. 2086.
5. The fourth case was United States v. Dexter Corp., 507 F.2d 1038 (7th Cir. 1974), and involved an interpretation of 33 U.S.C. § 407 (1970), originally section 13 of the 1899 Rivers and Harbors Appropriation Act. Most future actions comparable to this case are likely to arise under the FWPCA. Another case decided by the Seventh Circuit was Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 515 F.2d 513 (7th Cir. 1975). This case involved the AEC issuance of a construction permit for the Bailly Nuclear Electric Generating Station of Northern Indiana Public Service Company. While in a broad sense the opinion considered environmental issues, they were considered only as they related to the application by the AEC of its own licensing regulations. The majority (Judge Tone dissented) found that the AEC had violated its own regulations and set aside the AEC's decision. Certiorari was sought and the Supreme Court, in a per curiam decision, reversed the decision of the Seventh Circuit, remanding the case for consideration of the remaining issues. Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League of America, Inc., 96 S. Ct. 172 (1975).

faced with a growing number of environmental cases. Thus, these three cases may portend the approach of the court to what can be complex and difficult legal and factual issues.[6]

In *Swain v. Brinegar*[7] the Seventh Circuit was presented primarily with a NEPA issue. The case involved the selection of the corridor in which to construct a 15-mile segment of the supplemental freeway connecting Peoria and Lincoln, Illinois, the segment extending from a point between Delavan and Hopedale, Illinois, south to a point near Lincoln. The plaintiffs in the district court challenged the corridor selection process as being "arbitrary, capricious, and subversive of the legislative policy of full public disclosure and full public participation"[8] under the Federal-Aid Highway Act.[9] In addition, they alleged that the environmental impact statement was insufficiently detailed under NEPA and that the delegation to state highway authorities at the critical drafting stage of that statement was illegal. After a hearing, the district court dismissed the complaint on the merits,[10] and an appeal was taken.

On reviewing the record[11] the court would not substitute its judgment on the corridor selection for that of the Federal Highway Administration and upheld the selection procedures. The more difficult question was whether the subsequent adoption of NEPA was applicable to the project. Upon reviewing the statute, the court reiterated its decision in *Scherr v. Volpe*,[12] that the evaluation dictated by NEPA was required for ongoing projects unless they had reached the " 'stage of completion where the cost of abandoning or altering the proposed project clearly outweigh [*sic*] the benefits which could flow from compliance.' "[13] Since construction on this particular project had not even begun, that test of "exemption" was unavailable.

Having thus determined that NEPA had retroactive effect, the court turned its attention to a review of the draft and the final environmental

6. Of course, the Supreme Court and Congress are the ultimate arbiters of "truth" and as the Supreme Court is faced with these various issues, the views of the circuit courts are subsumed by such Supreme Court decisions. For example, Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975), was an appeal from a decision of the Fifth Circuit, Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390 (1974), involving the propriety under the Clean Air Act of state-granted variances from air pollution emission standards. By the time the issue reached the Supreme Court, five courts of appeals had faced the issue with three different results. These cases are discussed at note 91 *infra*.

7. 517 F.2d 766 (7th Cir. 1975).

8. *Id.* at 769.

9. 23 U.S.C. § 101 *et seq.* (1970).

10. 378 F. Supp. 753 (S.D. Ill. 1974).

11. It is important to note that although both the selection of the corridor and the passage of NEPA occurred in 1969, NEPA did not go into effect until January 1, 1970. As a result, the court had to base its decision on the law as it existed in 1969.

12. 466 F.2d 1027 (7th Cir. 1972).

13. 517 F.2d at 773.

impact statements (EIS) prepared by the Illinois Department of Transportation.[14] The court characterized the draft EIS as "rather superficial in several key areas,"[15] and pointed out that after it was circulated for comments among the appropriate governmental agencies, the final EIS "indicates little substantive change from the original draft."[16] A public hearing had been held on the final EIS and some of the specifically alleged deficiencies of the plaintiffs—the need for the improved road, the need for extensive chemical pollution tests, the desirability of alternate transportation modes, and the effect of removing about 700 acres of tillable land from agricultural production on the world hunger problem—were considered, and rejected, by the district court.

The Seventh Circuit, however, after quoting that portion of the district court's opinion concluded:

> But we believe that one of the fundamental purposes of NEPA is to require consideration of questions of general or broad significance, such as chemical pollution, alternative modes of transportation, and world resource exploitation. . . . Thus NEPA is clearly intended to focus concern on the "big picture" relative to environmental problems. It recognizes that each "limited" federal project is part of a large mosaic of thousands of similar projects and that cumulative effects can and must be considered on an ongoing basis.[17]

The court did not specifically find that each, or any, of these particular concerns must be analyzed and, in ordering the remand, it did not rely on these inadequacies. Rather, it found the fatal flaw was delegating responsibility for preparation of the EIS to the state. The court found that NEPA requires that the evaluation be done by the involved federal agency. The court's conclusion, relying on explicit language of NEPA, was also based on the view that state agencies were not in a position to evaluate national and worldwide environmental consequences and that these concerns of NEPA, if the preparation of the EIS were delegated to the state, would be ignored, since the likely result is that the responsible federal official simply would accept the state-prepared EIS. NEPA requirements could not be fulfilled by federal agencies merely reviewing a state prepared EIS nor could the court properly determine the adequacy of a federal agency's compliance with

14. It is of some interest that while the corridor was approved in 1969, the draft EIS was submitted on August 16, 1972. Although not clear from the opinion, the fact that an EIS was prepared indicates that the retroactive applicability of NEPA was not argued. In the earlier case, Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972), that argument was raised and rejected. With the lapse of time, of course, retroactivity becomes less important as a legal question and the court's decision on the criteria for compliance with NEPA is more significant.

15. 517 F.2d at 774.

16. *Id.*

17. *Id.* at 775.

NEPA if all it did was review such a statement.[18] Because the agency had failed "to conduct an independent, in-depth study of the potential environmental impact" of the proposed highway, the court remanded the case for the preparation of a new EIS which "must fully comply with . . . NEPA" and "must realistically consider all reasonably available alternatives . . . including no project at all. Analysis of these alternatives must be 'detailed' and must reflect meaningful evaluation of not only purely local considerations, but of any significant national or worldwide implications as well."[19]

The delegation problem with which the court was so concerned may no longer be of major significance. It must be remembered that this case, and the project it involved, straddled the effective date of NEPA and many of the problems with procedures for compliance have now been established. The Council on Environmental Quality has adopted guidelines applicable to all federal agencies for the preparation of impact statements.[20] These regulations go far to resolve the delegation question confronted by the court, as they make clear that the federal agencies have the responsibility to prepare the draft and the final EIS. Since in many cases much of the data required for an adequate appraisal is more readily available to the applicant—whether a state or a private party—these regulations permit the agency to rely "on an applicant to submit initial environmental information" but "the agency should make its own evaluation . . . and take responsibility for the scope and content of draft and final environmental statements."[21] This approach makes sense not only because the applicant may have easier access to much of the necessary data but also because, in most cases, the involved federal action is primarily for the benefit of the applicant and the cost to the agency is thereby minimized. Many agencies now require a detailed environmental report from an applicant which is then reviewed by the agency's technical staff and used as a starting point for preparing the EIS. This permits identification, and further investigation, if necessary, of the critical environmental parameters, while minimizing the burden on the agency for the collection and analysis of data on what may be necessary, but less significant considerations.[22]

While the major basis for the court's decision in *Swain* may no longer be a significant consideration, the discussion in the opinion of the substantive content of an EIS may cast some light on the view the court will take of such statements and also on the problems NEPA can create. For example, some

18. *Id.* at 778 & n.19.

19. *Id.* at 780. The court was also presented with a question of whether the suit could be maintained as a class action. The court held it could not.

20. 40 C.F.R. §§ 1500.1-1500.14 (1974).

21. 40 C.F.R. § 1500.7(c) (1974).

22. *See, e.g.*, 10 C.F.R. § 51.1-51.26 (1975), for the Nuclear Regulatory Commission's regulations on this matter.

concern with the removal of land from agricultural production was indicated. It may then be asked how the agency should treat this on remand. The court said that "significant national and worldwide implications" must be considered. The opinion indicates that about 700 acres of tillable land will be removed from production by the project, but the United States has about 472 million acres of cropland.[23] The question then arises as to whether that makes the removal "insignificant" and whether the agency can, with no more, simply point out the *de minimus* amount of land involved in order to satisfy the court's reading of NEPA. It is certainly not clear from the opinion whether such a simple treatment of this issue will suffice.

The court, in a footnote, may well have complicated not only the treatment of the land use question, but several other substantive considerations.

> We recognize, of course, that not every project of this type will have national or worldwide implications in and of itself. We do believe, however, that these projects should be viewed and evaluated in context with other similar projects throughout the nation to the extent that such evaluation may provide a basis for judgments as to large scale environmental priorities. Thus, for instance, while a single freeway project through farmlands may have negligible effect on world or national food problems, a major trend toward construction of many of these projects nationwide may have definite implications in these or other areas. One of the primary functions of an EIS is the isolation and evaluation of such trends.[24]

Obviously the 700 tillable acres in *Swain* is *de minimus*, but this is not necessarily the case for all the land taken from agricultural production by federally supported highway programs. In the re-evaluation required by the court, the agency could conclude that the highway program has or will remove too much land from production or that the cost of lost production exceeds the benefits from all the highways.[25] If that conclusion were reached here, the result, would, arguably, have to be the same for every unfinished segment of the highway system.[26]

23. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT No. 247, MAJOR USES OF LAND IN THE UNITED STATES, SUMMARY FOR 1969 (1969).

24. 517 F.2d at 780-81 n.22.

25. The so-called cost-benefit analysis that appears to be used in most NEPA statements received major support in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). It is clear that NEPA requires consideration of all, not just environmental, costs and benefits. It is an interesting, and still apparently unanswered question whether NEPA is purely procedural or if it has a substantive effect. That is, assume the costs of a given project outweigh the benefits, does NEPA then preclude the project or does NEPA merely require recognition of those costs and benefits?

26. The same result is possible on the question of alternative modes of transportation. A national analysis might conclude that electrified mass transportation would have been better than the highway system, but it would make little sense to transport people by this means over the 15-mile segment involved in this case since they could not go beyond the terminals at each end.

The problem thus would become a conflict between two national policies adopted by Congress. Congress passed both the highway legislation and NEPA; thus if the costs of the national highway system exceed its benefits, or if a lower cost alternative is available, Congress should have made that judgment. To expect it to be reconsidered for every 15-mile segment of highway seems, at best, useless.[27]

While speculation is difficult, the likely outcome of the new EIS resulting from the remand can be predicted. The agency will analyze the national trends in land use, the possibilities of alternative transportation modes (possibly suggesting, in the court's own words, that the national highway program has reached that stage of completion making alternatives unacceptable), and the other national issues and conclude, undoubtedly on a sound factual basis and after the addition of numerous pages of data, that national trends do not balance against this 15-mile segment. To expect any other result would mean that the Federal Highway Administration would have to conclude that its own enabling legislation is now contrary to national policy as expressed by NEPA and that, it would seem, is expecting too much from any bureaucracy. The new EIS, and probably every subsequent one, will contain detailed "boiler plate" sections on the land used for the national highway system, alternate modes of transportation and similar national issues. NEPA, of course, is drafted in very broad language and the court's conclusion on the need to broadly analyze the impacts certainly does not appear inconsistent with the language of the statute, but the application of that kind of analysis to such a small project as *Swain* involved is of questionable value in the decision-making process on such a project.

The court also recognized the necessity to analyze the impact on local areas and particularly the need for this highway segment.[28] It will probably be true for most projects that by narrowing the scope of the EIS inquiry, a more meaningful cost-benefit analysis will result. Certainly in *Swain*, as already discussed, the costs and benefits of the project on a national scale are virtually meaningless and a cost-benefit analysis of the national highway program for decision-making purposes on a 15-mile segment may also be virtually meaningless. On the other hand, a careful localized analysis may be useful. The first question would be, as the court itself stressed, the need to improve the particular highway link involved. Assuming that question is answered in the affirmative, however, the cost-benefit analysis would there-

27. The court did suggest that the program should not have been separated into such small segments. 517 F.2d at 776 n.12. It is doubtful that the whole stretch from Peoria to Lincoln would alter any national or worldwide analysis. Furthermore, it is inconceivable that an EIS could cover a sufficiently large quantum of highway construction so as to have a truly significant national impact, particularly now that most of the interstate system is completed, since no state (and states have the major planning responsibility) plans that much highway construction at one time.

28. 517 F.2d at 777.

after really be a least cost alternative analysis. For example, the opinion indicated three possible corridors for the highway had been considered. If all three would equally fulfill the need, that is, the necessity to upgrade this particular highway link which constitutes the primary benefit of this project, a comparison of the costs of the three alternatives could be far more useful for the decision-making process than a comparison of the merits of a national highway system with a national railway system.

Senior District Judge Grant,[29] in his dissent in *Swain*, may well have had this in mind when he inquired, "Is there not room for a rule of reason in the application of these statutes?"[30] Judge Grant relied on the decision of the Eighth Circuit in *Iowa Citizens for Environmental Quality, Inc. v. Volpe*,[31] where that court apparently was suggesting a least cost alternative analysis:

> The discussion of environmental effects need not be "exhaustive" but rather need only provide sufficient information for a 'reasoned choice of alternatives.' . . . [NEPA] does not require that 'each problem be documented from every angle to explore its every potential for good or ill.'[32]

Judge Grant's approach would not relieve the agency from analyzing the local impacts, but might have avoided the inclusion of the "boiler plate" in an EIS that seems likely to result from the majority opinion.[33]

A NEPA issue was also raised in the Seventh Circuit decision of *City of Highland Park v. Train*.[34] The plaintiffs sued to block construction of a shopping center and the extension and widening of a road along which it was to be built, relying on the Clean Air Act, NEPA, and the equal protection clause of the fourteenth amendment. The specific relief sought was to compel EPA, under the Clean Air Act, to promulgate indirect source[35] and significant deterioration[36] regulations which the plaintiffs hoped would

29. Senior District Judge Robert A. Grant, Northern District of Indiana, sitting by designation.

30. 517 F.2d at 783.

31. 487 F.2d 849 (8th Cir. 1973).

32. *Id.* at 852.

33. Senior Judge Grant also disagreed with the conclusion of the majority on the question of delegation to the state. 517 F.2d at 784. As discussed in the text above, however, the question of a federal agency relying on the submissions from an applicant appears to be resolved by the Council on Environmental Quality guidelines in a manner requiring that the actual EIS be prepared by the federal agency, yet permitting the agency to obtain inputs from the applicant. This meets the formal requirement of the court in *Swain* and probably fulfills the court's real concern—that the federal agency making the decision will in fact consider the environmental impact.

34. 519 F.2d 681 (7th Cir. 1975).

35. During the course of this litigation, as the court recognized (*id.* at 687), the EPA did promulgate such regulations, 40 C.F.R. § 52.22 (1974), which were applicable to indirect sources on which construction commenced after December 31, 1974.

36. Regulations on significant deterioration with respect to two pollutants, particulates and sulfur dioxide, were also promulgated during the pendency of this litigation. 39 Fed. Reg. 42,510 (1974).

prevent the construction. Plaintiffs also sought to enjoin the road work until a NEPA statement was prepared. Finally, plaintiffs' constitutional claim was directed against the village of Northbrook, where the shopping center would be located, alleging that the zoning ordinance permitting the construction was invalid. The district court had ruled against the plaintiffs, dismissing the action.[37] The Seventh Circuit affirmed.

The NEPA claim concerning the road work was disposed of in the district court on summary judgment. The Seventh Circuit found from the record that the road work was strictly a state matter, since no federal funds or approvals were involved. Therefore, NEPA was inapplicable.

The decision on the Clean Air Act issues is of more interest. Since EPA had promulgated indirect source regulations[38] by the time this case reached the Seventh Circuit, the court considered the complaint as one directed at those regulations and, specifically, at the exemption for projects commenced before January 1, 1975. The court concluded that this was merely an attempt to review regulations and, based on extensive authority,[39] found that section 307(b)(1)[40] of the Clean Air Act is the exclusive method for reviewing regulations. The court rejected the plaintiffs' attempt to characterize the exemption as a failure to promulgate regulations, stating that "a provision defining the scope of regulations and their effective date is as much a part of the regulations as the substantive parts . . . [and] must be reviewed in a petition for review. It cannot be reviewed in an action filed in the district court."[41]

The significant deterioration issue probably presented the most interesting question in this case. EPA had promulgated such regulations and the government argued that this mooted the question. Plaintiffs, however, contended that the issue was not moot because those regulations failed to deal with automobile-related pollutants and the court agreed. EPA was already under court orders to promulgate such regulations[42] and the district court had, in part, relied on these orders to deny the plaintiffs relief. The court of appeals found it unnecessary, however, to consider whether a second order by another court was necessary, since it held plaintiffs could not maintain their claim.

Section 304(a)[43] of the Clean Air Act permits suits against the Administrator of EPA to compel the performance of non-discretionary

37. 374 F. Supp. 758 (N.D. Ill. 1974).
38. 40 C.F.R. § 52.22 (1974).
39. 519 F.2d at 688-89.
40. 42 U.S.C. § 1857h-5(b)(1) (1970).
41. 519 F.2d at 689.
42. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub. nom.*, Fri v. Sierra Club, 412 U.S. 541 (1973).
43. 42 U.S.C. § 1857h-2(a) (1970).

duties, but section 304(b)[44] requires that the Administrator be given notice 60 days prior to such action. Since the plaintiffs had not given this notice, the court held they could not maintain this claim. The court reached its decision on June 10, 1975, but it modified the opinion on July 24, 1975, primarily on this issue. The reason for the modification, as the court stated in its note 10,[45] was a conflicting decision by the Court of Appeals for the District of Columbia[46] under comparable provisions of the FWPCA.[47]

In *Highland Park* the plaintiffs, attempting to avoid the 60-day notice problem, argued, among other grounds, that the district court had jurisdiction under the general federal question statute[48] and the Administrative Procedure Act.[49] The District of Columbia Circuit had held, under the FWPCA, that the statutory remedy provided in that act was not exclusive and that review was available under the Administrative Procedure Act and, apparently, the federal question statute. The District of Columbia Court's opinion on the question is extensive[50] and includes appendices setting forth extensive portions of the legislative history[51] of the Clean Air Act upon which that court relied in deciding the non-exclusivity of the jurisdictional provision in the FWPCA. On this specific question, and only on this question, Judge Robb dissented.[52]

The Seventh Circuit in *Highland Park* considered the opinion of the District of Columbia Circuit carefully,[53] but rejected that court's conclusion. It is obvious that if the jurisdictional requirement of giving notice can be avoided by basing jurisdiction on some general jurisdictional statute, the entire purpose of the notice provision would be undermined. Much of the legislative history referred to in the District of Columbia Circuit's opinion considered only citizen suits to compel EPA to enforce Clean Air Act standards against polluters;[54] that is a very different kind of proceeding than

44. 42 U.S.C. § 1857h-2(b) (1970).

45. 519 F.2d at 693.

46. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975). How the case came to the attention of the Seventh Circuit (the modified opinion of the D.C. Circuit is dated March 10, 1975) is not indicated in the *Highland Park* opinion, but the normal delay in publishing opinions suggests an explanation.

47. 33 U.S.C. § 1365(b)(2) (Supp. 1972).

48. 28 U.S.C. § 1331 (1970).

49. 5 U.S.C. §§ 702-705 (1970). The court also rejected plaintiffs' arguments based on the mandamus statute, 28 U.S.C. § 1361 (1970), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1970). 519 F.2d at 695-96.

50. 510 F.2d at 698-703.

51. *Id.* at 723-30.

52. *Id.* at 730-31. Whether rehearing or rehearing en banc in the District of Columbia, or certiorari to the Supreme Court, has been or will be sought is not known at this time.

53. 519 F.2d at 693 & n.10.

54. *See, e.g.*, Senator Muskie's statement with reference to section 304 of the Clean Air Act: "Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." 510 F.2d at 727.

was represented by *Highland Park* or the District of Columbia case, where the suits were to compel promulgation of regulations.

The logic of the Seventh Circuit's conclusion is compelling irrespective of what Congress may have had in mind for the type of suit represented by *Highland Park*, and it is not entirely clear that Congress really even considered this type of suit. If other jurisdictional bases are available, whatever objective Congress intended the notice provision to serve would be read out of the statute. Possibly the issue, apparently arising now under both the Clean Air Act and the FWPCA, will be resolved by the Supreme Court or by Congress.

A more substantive Clean Air Act issue was presented by *Indiana & Michigan Electric Company v. EPA*,[55] where the plaintiffs challenged EPA's approval of the Illinois and Indiana implementation plans under the Clean Air Act. Four issues were raised: (1) Whether NEPA applies to the approval; (2) whether technological feasibility and economic impact must be considered in approving the plans; (3) whether certain provisions of the plans as applied to the petitioners were arbitrary, capricious and an abuse of discretion; and (4) whether EPA was required to comply with the Administrative Procedure Act.

Basing its decision on a number of cases presenting the same question,[56] the court rejected the applicability of NEPA to EPA's approval of implementation plans. While this result appears firmly established, its logic can still be questioned. It is true, as the court pointed out, that the Clean Air Act requires EPA to undertake various actions fulfilling some of the same objectives as NEPA—policy reviews, economic cost studies, reports to Congress—but it is not at all clear that the results of those actions are weighed in any fashion by EPA in approving an implementation plan or adopting regulations. As the Seventh Circuit recognized in *Swain*, NEPA has a very broad coverage, requiring not only a consideration of strictly environmental impacts but also, through consideration of alternatives to a proposed action and the commitments of resources to the project, a consideration of what has come to be known as the costs and benefits of the proposed federal action. As the District of Columbia Court of Appeals has pointed out, EPA's "*raison d'etre* is the protection of the environment."[57] It may at least be questionable, therefore, whether that agency will, when taking action, in fact balance social and economic considerations against its *raison d'etre* as is required under NEPA for every other federal agency.

More significant may be the question of the adequacy of judicial review of federal action if there is no NEPA statement. Possibly, as the court

55. 509 F.2d 839 (7th Cir. 1975).
56. *Id.* at 843.
57. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973).

suggested, the agency, through its other statutory requirements, has considered all the alternatives and has considered the costs and the benefits for the approval of the implementation plan, but it may be asked how the court knows that to be the case. In *Swain* the Seventh Circuit was concerned with the possibility that a federal agency could merely "rubber stamp" an EIS prepared by the state agency or other applicant, but in approving an implementation plan there need be no EIS prepared by anybody. If, as the court indicated in *Swain*, it is a federal agency's responsibility to consider the factors raised by NEPA, and it is on the basis of the EIS that a court can determine whether the agency fulfilled that duty, the exemption judicially given to EPA precludes a court from ever reviewing the adequacy of EPA's consideration of the NEPA issues. It does appear, however, in light of the numerous decisions from various circuit courts, that this result is now too well-established to be changed short of congressional, or possibly Supreme Court, action.[58]

Another question with which the court was presented was whether EPA's failure to consider technological feasibility and economic impact violated the standards of the Clean Air Act. The court reviewed the criteria set forth in section 110(a)(2)[59] of the Act and concluded that for approval of implementation plans technological feasibility and economic impact were irrelevant. Petitioners' argument centered primarily on subparagraph (A) of that section, which requires that plans provide for the attainment of national ambient air quality standards as rapidly as practicable. They alleged that since the plans in question were technologically infeasible or economically prohibitive, the plans violated that provision. The court, of course, rejected this argument, finding no reference in the statute to a consideration of these factors but noting, consistent with the decision of the Sixth Circuit,[60] that technological and economic considerations are not wholly irrelevant. The court suggested that the question of technological feasibility could appropriately be raised in an enforcement action[61] as a defense to that action.

Having found these factors irrelevant for approving a plan, the court considered the argument that the plans were arbitrary and capricious, on the basis of the same factors, as specifically applied to the petitioners. That certain persons were unable to comply in no way meant the majority of the persons subject to the plan would be unable to comply. Just such a "special case" condition, the court emphasized, demonstrates the propriety of considering technological feasibility in enforcement actions, rather than in connec-

58. In passing the FWPCA Congress may have been less sure of the availability of this exemption for EPA because it exempted all but two actions by EPA under the FWPCA from NEPA. 33 U.S.C. § 511(c)(1) (1970).

59. 42 U.S.C. § 1857c-5(a)(2) (1970).

60. Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973).

61. *See* 42 U.S.C. § 1857c-8 (1970).

tion with the approval of implementation plans. Otherwise, it was apparently felt, a plan would have to contain separate provisions for every special case.

While the court recognized this result was consistent with the decision of tht Sixth Circuit, it also recognized it was inconsistent with results reached by the Third Circuit.[62] While indicating that it was not called upon to determine the extent technological and economic considerations should play in an enforcement action, the court indicated that the statutory language in section 113(a)(4) provided some guidance. Unfortunately, the "good faith" standard contained in that provision is difficult to understand in connection with a claim of technological infeasibility. One can ponder how many failed experiments a person subject to an enforcement action must have made before he has demonstrated sufficient good faith. Moreover, even if sufficient good faith is demonstrated, the court's result does create something of an anomalous situation. An implementation plan limitation is normally a specific, quantified emission limitation. A particular emission source may be able to establish that compliance with that limitation is technologically impossible. Thus the result is a clear violation of the plan, but it is a violation which apparently cannot be enforced. This does suggest that the need to determine technological feasibility might better be made before approving an implementation plan.[63]

The Third Circuit has in fact followed this approach in a series of decisions[64] involving the Pennsylvania implementation plan. The most recent decision, *Duquesne Light II*,[65] was the second opinion the Third Circuit issued concerning EPA's approval of the Pennsylvania plan. In *Duquesne Light I*[66] the court had remanded the approval to the agency for the consideration of technological feasibility and economic impact. The Third Circuit had determined that the state hearings were inadequate and the remand allowed either further state proceedings or a hearing by EPA. EPA held its own hearing,[67] and again approved the plan.[68] EPA relied

62. *See* St. Joe Minerals Corp. v. EPA, 408 F.2d 743 (3d Cir. 1975); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973) [hereinafter referred to as *Duquesne Light I*]; Duquesne Light Co. v. EPA, 522 F.2d 1186 (3d Cir. 1975) [hereinafter referred to as *Duquesne Light II*]. Contrary to the Seventh Circuit's approach, the Third Circuit in these cases has taken the view that EPA must review technological and economic factors in approving implementation plans. This may be a necessary corollary of that court's holding that such factors cannot be raised in enforcement actions. Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1973).

63. A NEPA requirement might have provided the most direct method of accomplishing such review.

64. See note 62 *supra.*

65. 522 F.2d 1186 (3d Cir. 1975).

66. 481 F.2d 1 (3d Cir. 1973).

67. It is interesting, as the court noted in *Duquesne Light II*, that at the EPA hearing the Commonwealth of Pennsylvania declined to defend its own plan. 522 F.2d at 1191 n.17. That may explain why EPA chose not to use state procedures. It may also illustrate, as those who practice in the field are aware, that some states have been

upon certain hearings (known as the "Arlington hearings") on sulfur control technology held by EPA and as a result of that reliance the utility petitioners in *Duquesne Light I*, who had not been parties to the Arlington hearings and had not fully participated in them, asked the court for a second remand to rebut the conclusions reached at the Arlington hearings. The court granted the remand without opinion on June 5, 1974. The Administrator of EPA, after the utilities submitted their data, responded to the court's second remand with a one-sentence statement affirming his reliance on the Arlington report and again affirming the Pennsylvania plan.

That led to *Duquesne Light II*. The only questions before the court were the technological and economic feasibility of complying with the Pennsylvania sulfur emission standards.[69] EPA contended that in the Clean Air Act Congress did not intend expense to be regarded as an impediment to the objectives of the Act. The court again remanded the plan to the agency for consideration of the likelihood of economic hardship.[70] A review of its analysis of the reasons for a remand on this basis[71] indicates that the court, at least on this question, expected not only an analysis comparable to that required by NEPA, but a decision based on the result of that analysis.[72]

Although the court recognized that since it was ordering a remand on the economic issue it need not consider the technology issue, the court did consider it extensively because of the continuing controversy on this point.[73] As a result, the remand order also required an evaluation of the technological feasibility of the emission restrictions.

In *Indiana & Michigan* the final question presented was the applicability of the Administrative Procedure Act to EPA's approval of the plans.[74] The court reviewed the procedures required at the state level under the Clean Air Act, the lack of any statutory requirement for formal or informal procedures in approving state plans, and the opportunity for participation

"persuaded" to adopt standards the states may not believe are possible to achieve because of the risk the plans will be disapproved by EPA and, in addition, because federal grant money might thereby, directly or indirectly, become unavailable.

68. That may not be too surprising since the one whose decision was in question, based on a subsequent hearing that he conducted, found that his original decision was correct.

69. The utilities also raised a rather novel contention: that the Administrator's chosen method of compliance, flue gas desulfurization systems, or "scrubbers" as such systems are frequently called, would create adverse environmental impacts, primarily water pollution problems. 522 F.2d at 1192. Again the question of the need for EPA to prepare an EIS appears.

70. 522 F.2d at 1192.

71. *Id.* at 1192-1196.

72. *See* note 25 *supra.*

73. 522 F.2d at 1196-1200.

74. A constitutional challenge to EPA's procedures was also raised and rejected by the court.

and submission of comments on such related matters as the promulgation of ambient standards. On this basis the court found the Administrative Procedure Act inapplicable, concluding "that Congress was of the view that an adequate hearing at the state level would serve the purposes of" that Act.[75] The court did not, however, consider the adequacy of the state hearings and the opinion does not indicate whether the records in the state hearings were before the court.

This result appears to go a step further than any of the other circuits. As already indicated, the Third Circuit reviewed and found the Pennsylvania procedures inadequate.[76] The Sixth Circuit vacated the approval of the Ohio and Kentucky plans and remanded them to EPA for proceedings under section 553 of the Administrative Procedure Act, apparently irrespective of the state proceedings.[77] The Fourth Circuit held that EPA need not hold hearings on the Virginia, West Virginia and Maryland plans *if* the state hearings were adequate and *if* the Administrator reviewed those hearings prior to his approval.[78] The court rejected EPA's argument that the court was limited to reviewing only the approval order and the state plans. At the time of the decision the record was not complete in that the state hearing records had not been certified to the court. As a result, the court held it was premature to order a remand, but there was no subsequent decision. It would appear likely, therefore, that the records or the Administrator's review thereof may well have been inadequate, and EPA chose to resolve the case without certifying those records to the court and without further review.

The somewhat different approach taken by the Seventh Circuit may be understandable in light of the position taken by EPA before the court. It is necessary, before considering this point, to understand what may have concerned the other circuits: the so-called Getty Oil dilemma,[79] a problem which clearly concerned the Third Circuit.

*Getty Oil* involved a federal enforcement action based on the Delaware implementation plan[80] and Getty's attempt to restrain federal enforcement. No review of EPA's approval of that plan was sought in the federal courts, but Getty had pursued state remedies and at the time of the court's decision a Delaware court had restrained state enforcement of the challenged regulation. The Third Circuit held that Getty could only challenge the validity of the plan provision for purposes of federal enforcement by seeking review of EPA's approval of the state plan in the federal court.

Thus *Getty Oil* may create two dilemmas. Even if a plan requirement

75. 509 F.2d at 847.
76. 481 F.2d 1 (3d Cir. 1973).
77. Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973).
78. Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973).
79. Getty Oil Co. v. EPA, 467 F.2d 349 (3d Cir. 1972).
80. It must be noted that under the Clean Air Act a state plan becomes a federal regulation once it is approved by EPA.

is technologically impossible, that contention would have to be raised in an action to review the plan, because it would be unavailable as a defense to an enforcement action. The Seventh Circuit, in *Indiana & Michigan*, as did the Sixth Circuit in *Buckeye Power*,[81] avoided this dilemma by finding that technological infeasibility is a defense to an enforcement action.

The second dilemma of *Getty Oil* stems from the statutory provision making state plans federally enforceable once they are approved.[82] The fact that a state court in *Getty Oil* had restrained state enforcement did not protect Getty from federal enforcement. It may be asked what will happen if a state court invalidates a state plan after it has been federally approved and whether it still may be federally enforced.

The Seventh Circuit apparently obtained an answer to this question from EPA.

> In addition, petitioners have a right to challenge the reasonableness of state plans in the state courts, and as the respondent [EPA] concedes, if "part of a state implementation plan is held invalid by a state court, the state would have to revise that part. Should the state fail to do so, the Administrator must propose and promulgate a revision. . . . In either case, a hearing, or at least an opportunity for a hearing, is a prerequisite to adoption of the new regulation."[83]

Of course, this could present a timing problem if EPA brought an enforcement action while the state courts were still reviewing the validity of the state plan.

This is not entirely a theoretical consideration in the Seventh Circuit. The Illinois implementation, EPA approval of which was affirmed in *Indiana & Michigan*, has been challenged in part in the state courts. In *Commonwealth Edison v. Pollution Control Board*,[84] the Illinois Appellate Court reversed part of the plan, vacating and remanding to the Board other parts of the plan. That decision is being reviewed by the Illinois Supreme Court.[85] Should it be affirmed, there arises a possibility the Seventh Circuit may be called on to reconsider the position, quoted above, that EPA took in *Indiana & Michigan*. If the Illinois Pollution Control Board is compelled to revise the plan, or if EPA must promulgate a revision, as a result of a state court decision adverse to the plan, the approval or disapproval[86] of the revision would again be subject to review in the Seventh Circuit.

81. 481 F.2d 162 (6th Cir. 1973).
82. 42 U.S.C. § 1857c-8 (1970).
83. 509 F.2d at 847 (citation omitted).
84. 25 Ill. App. 3d 271, 323 N.E.2d 84 (1st Dist. 1975).
85. No. 47352, scheduled for oral argument on September 24, 1975.
86. As to the question of the right to seek review of a disapproval, as distinct from an approval, by EPA, see Big Rivers Elec. Corp. v. EPA, 523 F.2d 16, 18 (6th Cir. 1975).

Another area in which the Seventh Circuit may be faced with additional cases as a result of the opinion in *Indiana & Michigan* is the enforcement area. Since the court has held technological feasibility a proper consideration for an enforcement action, it has avoided the need, faced by the Third Circuit,[87] to consider this question at the "front end", at the stage of plan approval. Thus while the Third Circuit will not be faced with this question in reviewing any enforcement action,[88] the Seventh Circuit may be. This may be particularly true for requirements to install flue gas desulfurization systems ("scrubbers"), in light of the Third Circuit's clearly expressed doubts about the current technological feasibility of scrubbers.[89]

Recent developments also indicate some other areas in connection with the Illinois plan, and possibly others, that may come before the Seventh Circuit. The Supreme Court, in *Train v. Natural Resources Defense Council, Inc.*,[90] resolved a conflict among five circuits[91] over the scope and extent to which states could grant individual emission sources variances from state plan limitations. The Supreme Court, reaching the same result as the Ninth Circuit, found that states can grant variances after the attainment date as long as the variances will not prevent attainment and maintenance of national ambient standards. The Supreme Court, however, reached this result on a different basis than that relied upon by the Ninth Circuit.[92] Since variances granted by the states will presumably be submitted to EPA for approval as revisions to implementation plans,[93] EPA's approval or disap-

87. Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973); St. Joe Minerals v. EPA, 508 F.2d 743 (3d Cir. 1975); and Duquesne Light Co. v. EPA, 522 F.2d 1186 (3d Cir. 1975).

88. Getty Oil Co. v. EPA, 467 F.2d 349 (3d Cir. 1972).

89. Duquesne Light Co. v. EPA, 522 F.2d 1186, 1196-1200 (3d Cir. 1975).

90. 421 U.S. 60 (1975).

91. While the opinions of the five circuits are complex, they are divided into three groups which can be briefly summarized. The Fifth Circuit held that no variances could be granted at any time. Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390 (5th Cir. 1974). The First, Eighth and Second Circuits all held that states could grant variances at any time up to the date attainment of national ambient air quality standards was required by the Clean Air Act, but not thereafter. Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690 (8th Cir. 1973); Natural Resources Defense Council, Inc. v. EPA, 494 F.2d 519 (2d Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973). The Ninth Circuit, which was the last circuit to speak on the issue before the Supreme Court's decision adopted the view, without reliance on a specific statutory basis, that the Clean Air Act was intended to allow the states to act with flexibility and, therefore, states could grant variances at any time, provided that the variance would not preclude attainment of national standards. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. 1974).

92. While the Ninth Circuit relied essentially on the need for flexibility, the Supreme Court found that the authority given to the states to revise their plans from time to time, section 110(a)(3), permitted revisions (in the form of a variance) even for a single source, as long as the states met the criteria for such plans. 421 U.S. at 73-75.

93. It would make no sense to grant a variance and not submit it as a revision, since the variance would be ineffective at protecting the emission source from federal enforcement unless it is approved by EPA as a revision to the implementation plan.

proval of such variances and revisions will be subject to review under section 307(b)[94] of the Clean Air Act. It is not unlikely, therefore, that the Seventh Circuit may be called upon to review such actions by EPA.

There is another recent development in Illinois that may well find its way to the Seventh Circuit on review of EPA's action in approving or disapproving revisions to the Illinois plan. On September 26, 1975, the Governor of Illinois signed into law a bill[95] amending certain provisions of the Illinois Environmental Protection Act[96] to require the Illinois Pollution Control Board to adopt regulations permitting the use of what is known as intermittent control systems (ICS) for sulfur dioxide emissions. Simply stated, an ICS combines monitoring ambient air conditions and predicting meteorological conditions to determine the possible occurrence of excessive ambient concentrations of sulfur dioxide and to alter the level or manner of operations of emission sources to prevent such occurrences. Even before the passage of this amendment, the Illinois Pollution Control Board had been holding extensive hearings on possible adoption of regulations permitting utilization of ICS.[97] If, as now appears likely, the Board adopts such rules, they are almost certain to be submitted to EPA as a revision to the Illinois plan and EPA's action on that revision could come before the Seventh Circuit.

Two circuits have been presented with issues relating to ICS.[98] The Fifth Circuit invalidated a provision of the Georgia plan allowing a type of ICS characterized as the "tall stack" approach.[99] While it was this decision that the Supreme Court was called upon to review in *Train*,[100] the issue concerning the validity of ICS was neither presented to, nor considered by, the Court.

In a recent Sixth Circuit decision, *Big Rivers Electric Corp. v. EPA*,[101] a similar ICS issue was raised. EPA had disapproved a provision in the Kentucky plan which provided, among other things, that an emission "source can apply an alternate control strategy which will provide for achievement and maintenance of ambient air quality standards."[102] EPA

94. 42 U.S.C. § 1857h-5(b) (1970).
95. Public Act No. 79-1099, § 1 (Sept. 26, 1975), *amending* ILL. REV. STAT. ch. 111½, §§ 1003, 1010 (1973).
96. ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1973).
97. Pollution Control Board Docket Nos. R 74-2, R 75-5.
98. As will be seen from the discussion that follows in the text, the result of judicial review may depend upon the way a state provides for an ICS.
99. Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390 (5th Cir. 1974).
100. 421 U.S. 60 (1975).
101. 523 F.2d 16 (6th Cir. 1975).
102. *See* Big Rivers Elec. Corp. v. EPA, 523 F.2d 16, 18 (6th Cir. 1975).

had disapproved this provision because it might be construed as permitting intermittent controls where constant controls are available.

The court affirmed EPA's disapproval,[103] relying on the language in the statute requiring that state plans include "emission limitations" and, particularly, on the word "composition" in the Supreme Court's analysis of that phrase. It stated that a "State's plan must include 'emission limitations' which are regulations of the composition of substances emitted into the ambient air."[104] The Sixth Circuit said it would not assume that the word "composition" was imprecisely used and since that word, in the court's view, meant the amount of an emission, an implementation plan must quantitatively limit emissions unless there is "a showing that measures which satisfy that definition were unavailable."[105]

It must be remembered that the Supreme Court was not faced with a question of the propriety of ICS. A reading of the Supreme Court's opinion suggests that it views the primary federal objective as the attainment and maintenance of national ambient air quality standards and it is primarily the responsibility of each state to determine how to achieve that result.

> [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. . . . Thus, so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. . . . [T]he revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.[106]

Further doubt may be cast upon the Sixth Circuit's decision by contrasting its result with the result the Supreme Court reached. In effect, the Supreme Court was saying that a state can grant a variance, which could contain absolutely no emission or time limitations, so long as ambient standards would be met. To say as the Sixth Circuit did, that a state cannot utilize a control strategy that will achieve the primary federal objective—ambient air quality—appears inconsistent with the Supreme Court's view.

It may be that the particular facts presented to the Sixth Circuit created the difficulty, or because of those facts, that court was not fully informed of

103. By the time the case reached the Sixth Circuit the subject provision of the Kentucky plan had been eliminated but the court held the issue was not moot. 523 F.2d at 18-19.

104. *Id.* at 21.

105. *Id.* at 22.

106. 421 U.S. at 79.

the nature of an ICS. Even if one uses that court's view of "emission limitations," however, the fact remains that an ICS *can* quantitatively limit emissions, although it does so only when necessary to meet ambient standards.

If that does not comport with the Sixth Circuit's view, and assuming that its view is correct, there still would be room for a properly designed ICS in a state implementation plan. An example may better illustrate. Assume a state concludes that a certain quantitative limit on emissions will meet ambient standards under 95 percent of the meteorological conditions, but would potentially cause violations 5 percent of the time. The state then adopts two quantitative limits, one which meets ambient standards 100 percent of the time and the lesser limit that meets ambient standards 95 percent of the time, but the state requires any emission source selecting the lesser limit to implement an ICS that will assure compliance the other 5 percent of the time.

How such a plan would fare in the Sixth Circuit is unclear, but it does appear to meet the Supreme Court's test. If, as the Supreme Court said, it is for the state to develop the policy "choices as to the most practicable and desirable methods"[107] for meeting ambient standards, the kind of plan hypothesized above should be acceptable, as should a plan utilizing only an ICS in the proper factual situation. It does seem valid for a state, such as Illinois, to conclude that it is economically unreasonable, regulatory over-kill or "not suited to its particular situation" to require, for example, an Illinois emission source to utilize coal from Wyoming that in fact is necessary only 5 percent of the time to meet ambient standards when an ICS would also achieve those standards 100 percent of the time at far less cost.

An alternative approach, under the same hypothetical conditions, could place an ICS approach even more clearly within the scope of the Supreme Court's decision and avoid the Sixth Circuit's conclusion. A state could adopt a quantitative emission limit to assure compliance with ambient standards 100 percent of the time. In addition, it could adopt provisions for granting variances from that limit if the source requesting the variance was willing to implement an ICS and could demonstrate that the ICS would assure compliance with ambient air quality standards. As a result, the implementation plan would contain the constant emission limitation the Sixth Circuit apparently insists on, but many sources might obtain variances consistent with the Supreme Court's conclusion and therefore not be required to comply with the emission limitation. The result of the Sixth Circuit decision appears to be an elevation of form over substance; what cannot be done one way can be done by calling it something else.

Since Illinois is now legislatively committed to an ICS and since EPA

107. *Id.*

has indicated, with respect to the Georgia[108] and Kentucky[109] plans, that it opposes this approach, it is not unlikely that the Seventh Circuit may be called upon to consider EPA disapproval of a revision to the Illinois plan providing for ICS. The *Indiana & Michigan*[110] decision, however, does not really provide any indication on how the Seventh Circuit would deal with such a disapproval.[111] To the extent EPA's disapproval is based solely on its view of the legal questions involved, presumably the court would review these questions. On the other hand, if the disapproval is based on factual questions, the *Indiana & Michigan* decision appears to indicate some reluctance by the court to review the record on which EPA makes factual determinations pertaining to implementation plans.

While only time may provide answers to these questions, it is clear that even after five years many unresolved issues remain under the Clean Air Act. Since the FWPCA is a much more recent enactment, it has only started to generate litigation. The clear probability is that the court will see a growing number of environmental cases in the future.

108. Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390 (5th Cir. 1970), *rev'd on other issues sub nom.*, Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975).

109. Big Rivers Elec. Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975).

110. 509 F.2d 839 (7th Cir. 1975).

111. Of course, if the Sixth Circuit's decision should be reviewed by the Supreme Court, that could settle the questions that exist on the propriety of ICS. Congress might also resolve these questions as legislation to permit the use of ICS has come before the Congress in the past, although some of the proposals would permit the use of ICS only for a limited time. *See, e.g.*, S. 594, 94th Cong., 1st Sess. (1975). That does not imply that Congress believes ICS is not permitted under the Clean Air Act; rather, it appears to be a response to EPA's intransigence in allowing the use of ICS. At one time EPA proposed, but it never adopted, regulations to serve as guidelines for the states in adopting plan provisions to permit ICS.